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Regulatory Advisor

December 12, 2001

Mr. Randy Bates  
Division of Governmental Coordination  
Office of the Governor  
P. O. Box 110030  
Juneau, Alaska 99811-0030

Re: SeaRiver Maritime, Inc. comments on proposed changes to  
Alaska Coastal Policy Regulations (6 AAC 50)

Dear Mr. Bates:

The following comments are submitted on behalf of SeaRiver Maritime, Inc. ("S/RM") with respect to the Division of Governmental Coordination ("DGC") proposed revisions of October 1, 2001 to the Alaska Coastal Management Program ("ACMP") regulations at 6 AAC 50. These comments are a follow up those of Mr. Harold W. Yates of SeaRiver on February 28, 2001, with respect to DGC's earlier proposed draft changes to the regulations. S/RM once again appreciates the efforts of DGC and agency personnel to revise the ACMP regulations and the opportunity to comment upon the proposed changes.

S/RM transports Alaska North Slope crude oil from the Port of Valdez under a contingency plan approved by the Alaska Department of Environmental Conservation ("ADEC") as consistent with both its regulations and those of the ACMP. S/RM's comments arise from its ACMP experience during approval and subsequent renewals of its Prince William Sound ("PWS") Oil Spill Response Contingency Plan.

S/RM also joins in and supports the comments on these revised regulations which are being submitted by the Alaska Oil and Gas Association ("AOGA"). The AOGA comments reflect extensive discussion and review of the draft regulations by many of its members, including S/RM, as well as a broad consensus of that group about directional changes needed in the regulations. S/RM will not repeat here the line by line comments prepared by AOGA, but will instead address concerns which S/RM has raised in the past and which remain relevant to the revised proposed regulations.



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S/RM's general concerns about the proposed regulations set forth below include the absence of any predictable time frame for review, use of "homeless stipulations," the broad and indefinite scope of matters subject to ACMP review, extraterritorial jurisdiction for district programs, duplicative processes to challenge a permit determination, and failure to address "uses of state concern." S/RM's direct concerns arise from, and relate to, ACMP review of tanker vessel oil spill contingency plans and to the inclusion in the proposed regulations of Regional Citizens' Advisory Councils ("RCAC"s) as review participants in that process. For the reasons set forth below, S/RM believes that ACMP review of vessel contingency plans is unwarranted and unnecessary, and that RCACs should not be made review participants in the ACMP consistency review process.

### General Concerns

As S/RM noted in its prior comments on an earlier draft of the regulations, DGC's stated goals included establishing "efficient" regulations and a "predictable review process." These are worthwhile goals, and in some respects the proposed regulations are helpful in this regard, for example, those imposing some limits on ACMP review of modifications and renewals of projects, and those requiring that petitions or comments be based upon clearly identifiable coastal district enforceable policies. Unfortunately the proposed regulations in many basic respects do not accomplish these or other necessary objectives.

The underlying problem appears to be the extent to which the proposed regulations simply codify existing ACMP practices of questionable legality or benefit which have grown up over time. These practices do not in many cases reflect either the original intent of the program or a considered application of federal and state statutory requirements. Nor do they resolve problems of regulatory delay, redundancy, and needless creation of opportunities for legal challenges to projects. Indeed, they have become a cause of increasing delay and expense for businesses which must attempt to comply with them.

The present regulations have been in effect for seventeen years. New regulations adopted now will likely establish the regulatory requirements for projects subject to ACMP review for many years to come. S/RM therefore believes it is critical for the new regulations to address and resolve fundamental concerns about ACMP review. These include the following:

- The proposed regulations do not provide for completion of ACMP review of major projects within reasonable and predictable timeframes and do not reconcile agency authority and timelines with ACMP review. For example, the numerous "timeout" provisions at 6 AAC 50.280 and elsewhere by which ACMP review can be stopped are so broad and open ended (including an indefinite "timeout" for any "complex" project at 50.280(a)(7)) that it is impossible to predict how long a review of a major project might take.

- It is also unclear what informational requirements may be imposed upon an applicant by the ACMP under 6 AAC 50.245 in addition to those already established for agency permits. Thus, under the proposed regulations, it is impossible to tell how much or what kind of information might be required for major project review. This creates more possibility for delay and for potentially overreaching information requests.
- The proposed regulations specifically endorse the use of "homeless stipulations" (known in the regulations as "alternative measures") which are beyond any agency permitting authority. See, e.g., proposed 6 AAC 50.272(b). This is contrary to the original intent of the ACMP, which was not to establish a coastal zone "permit" but to utilize existing authorities to the greatest extent possible. See, e.g., AS 46.40.090; AS 46.40.200. It is also unlawful, as there is no legal basis to impose stipulations which are beyond any existing agency authority and for which there are no defined standards. There is no reason to suppose that existing agency permitting authority is insufficient to address any appropriate conditions for a project approval.
- The scope of ACMP review under the proposed regulations, repetitively addressed at proposed 6 AAC 50.005, .025, .200, and .230, is both unduly broad and improperly vague. While S/RM supports the drafting change in .005 intended to limit review to projects previously identified on the "C" lists, the overall standard encompassing any "project which may affect any coastal use or resource" is far broader than intended by the Alaska legislature or federal guidelines for state programs. Instead, the ACMP should address uses with "direct and significant impact." See, e.g., 2 Chptr. 84 SLA 1977 at (3); AS 46.40.210(7); 15 C.F.R. 923(3)(b), 923.10, 923.11(a)(1), 923.11(a)(2), 923.31(a)(1). Nor should the scope of review of a matter be decided by a reviewing agency on a standardless, ad hoc basis as set forth under proposed 6 AAC 50.025(a), or encompass collateral activities which are not properly reviewable themselves under the ACMP.
- The proposed regulations apparently endorse, and certainly fail to resolve, the existing practice of affording local district programs extraterritorial jurisdiction over projects outside their boundaries, outside their governmental authority, and/or outside the coastal zone. Such extraterritorial jurisdiction is contrary to law. Under federal and state ACMP statutes district programs are required to have defined boundaries and jurisdiction. See, e.g., 16 U.S.C. 1453(1)(defining the boundaries of the coastal zone); 16 U.S.C. 1455(d)(2)(A)(requiring "identification of the boundaries of the coastal zone subject to the management program"); AS 46.40.030(1)(requiring "a delineation within the district of the boundaries of the coastal area subject to district coastal management program"); AS 46.40.040(1)A)(requiring the Council to identify such boundaries.) Here, however, while the proposed regulations provide a basis for a district program which alleges a "direct and significant impact" from a project outside its boundaries to participate in a consistency review, see proposed 6 AAC 50.055(b) and 50.990(41), the regulations fail to clarify that such standing to participate does not make a project subject to extraterritorial jurisdiction of the program. The result of this approach has been that projects, including contingency plans, may be subject to conflicting local standards by multiple district programs acting outside their jurisdictions.

- In addition to the basic ACMP process, the proposed regulations continue to allow the possibility of multiple appeals of regulatory decisions which are overly unburdensome, unfair and unnecessary. Such reviews can occur (and, in the case of contingency plans, have in fact taken place) through an agency adjudication, through the petition process, through two levels of elevation hearings (with "policy direction" potentially coming from the governor himself), and in each case, additional review in court. These duplicative processes of review serve no useful purpose, but provide broad opportunities to those simply interested in mounting legal challenges to projects.
- There appear to be no objective standards or procedures for consistency reviews and elevations. While provisions for possible "consensus" in consistency reviews and for "policy direction" in elevations may be useful as practical measures, they are not a substitute for defined legal standards and procedures. See proposed 6 AAC 50.260(c); proposed 6 AAC 50.610(g)(1) and(k)(1).
- The ACMP has yet to address necessary limits upon district program authority over "uses of state concern," which certainly include matters of regional energy transportation. See AS 46.40.210(8)(A); 16 U.S.C. 1455(d)(8) and (12). In particular, to the extent the proposed regulations authorize district programs to impose either conditions or homeless stipulations upon projects, the regulations must provide, as the ACMP statutes require, for a process to identify uses of state concern and to ensure that the ACMP consistency review process is not used to arbitrarily restrict or exclude them. See AS 46.40.040(4); AS 46.40.070(c). But while the Council has broadly construed district program authority in many respects, it has never addressed this fundamental protection for uses which are of greater than local concern. The regulations should identify uses of state concern as required by statute and, in the consistency review process, require that district program policies be applied in a fashion which does not arbitrarily or unreasonably restrict or exclude them.

S/RM appreciates the difficulty in addressing such fundamental concerns. Nevertheless, S/RM strongly believes that any revision of regulations must attempt to do so. Given the fact that it may be many years before another revision of these regulations occurs, it is critical to address such basic policy and legal concerns about the program, and not merely to codify existing practices.

#### Oil Spill Contingency Plans

ACMP review of oil spill contingency plans remains a primary concern of S/RM because periodic renewal and approval of such plans is a requirement of state law for S/RM to conduct its business in Alaska. S/RM notes that the December 3, 2000 draft revisions to the regulations contained a definition of "activity" which included "oil spill contingency planning," thereby apparently mandating ACMP review of such plans as a matter of regulation. S/RM supports dropping that definition in the current draft regulations. At the same time, however, S/RM understands that contingency plans continue to be listed on DGC's "C" list of activities requiring ACMP review under proposed 6 AAC 50.005. S/RM continues to believe, for the reasons set forth

below, that vessel contingency plans should not be subject to ACMP review. At minimum, any renewal of previously approved plans should be specifically exempt from further ACMP review.

1. Contingency plans, are, first, neither a project nor an activity within the meaning of ACMP statutes. In the case of the Prince William Sound plans, the underlying "project" or "activity" of marine shipment of oil was approved by Congress in the TransAlaska Pipeline Act.

Contingency plans do not authorize any coastal activity or use. Instead, they are plans describing resources and strategies for pollution prevention and cleanup. Some, like vessel contingency plans, are not even related to facilities physically sited in a coastal location but result from navigation and interstate commerce. Ports and terminals associated with vessel operations are physically sited facilities that are listed separately for ACMP consistency site and operating plan determinations.

Contingency plans do not approve or substitute for obtaining required permits during oil spill pollution response activities. During a response, all permits necessary for activities such as waste disposal, vessel operations, shorelines access or usage, etc. must be obtained from applicable regulatory authorities.

2. Contingency plans are, instead, a planning measure required by statute at AS 46.04.030. The statutory requirement is for a plan "approved by the Department [of Environmental Conservation]" not by the ACMP. AS 46.04.030(h) provides that "the Department [DEC] is the only state agency that has the power to approve, modify, or revoke a contingency plan . . ." The legislature has also established extensive civil and criminal penalties for failure to comply with plans or to have access to the "quality and quantity of resources identified in the plan." AS 46.04.030(g). ADEC has, in turn, promulgated extensive regulations and technical requirements governing applications, public review, content, approval and appeal procedures. ADEC also maintains Alaska's pollution prevention and response expertise. Neither the federal government nor any other state makes contingency plan regulation part of the Coastal Zone Consistency Determination process.

Most importantly, the legislature obviously intended contingency plan issues to be addressed by a single agency, ADEC, with expertise in the area. Expanding review of contingency plans to include other agencies, multiple local coastal districts, and the RCAC as a "review participant," is contrary to statute and creates confusion over applicable standards and review processes.

3. The ACMP itself, in any event, also incorporates ADEC air, land and water quality regulations, as administered by ADEC, as components of the ACMP (6 AAC 80.140). It is unclear how or why any additional ACMP standards can thus apply to contingency plans. Nevertheless, the ACMP and the proposed regulations use an expansive definition of "affected coastal district" as a district that "may experience direct and significant impact from a proposed project." In practice, this has been interpreted to mean that virtually any

coastal district along Alaska's coast may claim potential and overlapping impacts to seek consistency reviews for its ACMP enforceable policies over vessel operations.

In addition, even if vessel contingency plans were properly subject to ACMP or multiple district program review, they would certainly be a "use of state concern" within the meaning of that term pursuant to AS 46.40.210(8). As such, they should be protected under the ACMP itself from arbitrary or unreasonable regulation by local district programs.

4. Regulating contingency plans solely under existing ADEC and USCG OPA-90 federal pollution control regulations would remove redundancy and streamline contingency plan renewal reviews, promote regulatory efficiency, not reduce pollution prevention and response, and make Alaska consistent with the regulatory process in the rest of the country. It would not obviate ADEC's current regulatory obligation to consider comments upon plans from citizens, local districts, and other resource agencies, but merely provide a more efficient means to do so pursuant to one set of procedures and regulations.

#### RCACs as "review participants"

S/RM opposes inclusion of Regional Citizens Advisory Councils ("RCACs") as "review participants" in the ACMP process. See proposed 6 AAC 50.990(25). While S/RM appreciates that this action was taken in an older regulation, it believes that according two private organizations special status in a government review process should be reexamined from the perspective of roles of Citizens Advisory Councils, precedents created that may apply to other private groups and codification of special rights otherwise reserved to state/local governments.

S/RM's comments do not intend any criticism of either the Prince William Sound or Cook Inlet RCAC. S/RM appreciates that these are independent advisory groups, consisting of various private interests in the Prince William Sound and Cook Inlet Regions, which have a legitimate role to play. The question, however, is whether a grouping of private interests can or should be accorded special status in ACMP reviews. S/RM believes they should not.

An RCAC is neither a state agency, local government, or coastal district. It is thus unclear, in the first instance, by what authority an RCAC may be included in a government mandated review process. Nothing in ACMP statutes authorizes private groups to participate in a consistency determination. Inclusion of an RCAC, and its private member groups, in legal review by the government of contingency plans appears to impermissibly delegate government authority to a private group and to elevate the authority of one such group over all other private citizens or groups that may be interested in review of any project. No doubt there are many private citizens groups throughout Alaska who are interested in many projects and activities within the coastal zone. This does not mean that they should lawfully be given a formal role in the review of a project under the ACMP.

Nor does an RCAC have any unique role related to local government or agency expertise in the ACMP. Had Congress intended an RCAC to participate in ACMP reviews, or other formal government processes, it would have so provided in the authorizing statute. Instead, Congress

intended an RCAC to be an independent advisory group representing its constituents not only with industry but with government as well. An RCAC's independent advisory role to both is blurred or compromised by including it as an ACMP "review participant."

Inclusion of an RCAC as a "review participant" should also be examined in light of the expanded role of "review participants" in the ACMP process that is envisioned by the current regulations. For example, provisions for requests for information by review participants have been broadened. Review participants can now propose "alternative measures," and can comment upon things either within or outside their areas of expertise. Now, a coordinating agency would be required by regulation to seek a "consensus" not just of state resource agencies, as before, but of all "review participants." Each of these regulations confers substantive and procedural authority upon each review participant. It is again inappropriate to extend such authority to a private organization.

On behalf of SeaRiver, thank you for your consideration of these comments.

Yours truly,

A handwritten signature in black ink, appearing to read "A. T. Coffey/msj".

ADEC Commissioner Michele Brown  
AOGA Director Judy Brady  
DGC Director Pat Galvin